STATE OF MICHIGAN

COURT OF APPEALS

MACOMB COUNTY and MACOMB COUNTY SHERIFF,

Plaintiffs/Counter Defendants-Appellants,

v

POLICE OFFICERS ASSOCIATION OF MICHIGAN,

Defendant/Counter Plaintiff/Appellee-Cross Appellee,

and

MACOMB COUNTY PROFESSIONAL DEPUTY SHERIFF'S ASSOCIATION,

Defendant/Appellee-Cross Appellant.

UNPUBLISHED
September 20, 2011

No. 299436
Macomb Circuit Court
LC No. 2009-001355-CL

Before: SAWYER, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Plaintiffs Macomb County and Macomb County Sheriff (the County), appeal as of right from the circuit court order denying its motion to vacate an arbitration award and granting summary disposition in favor of defendant Police Officers Association of Michigan (POAM). Defendant Macomb County Professional Deputy Sheriff's Association (MCPDSA) have filed a cross appeal from the circuit court order. Because the arbitrator exceeded his jurisdiction, we vacate the decision of the circuit court and remand to the arbitrator for further proceedings consistent with this opinion.

This case involves a labor dispute between the County, POAM, and the MCPDSA regarding call-in priority when the sheriff determines that overtime is necessary for dispatch and the jail. POAM currently represents the Macomb County Sheriff's Department deputies and dispatchers, and the MCPDSA represents the Macomb County correctional officers. Prior to 2002, the MCPDSA represented the deputies, dispatchers, and corrections officers. In 2001, the deputies and dispatchers split from the MCPDSA and formed their own bargaining unit, POAM.

Thereafter, the MCPDSA negotiated a new collective bargaining agreement on behalf of the corrections officers, and POAM negotiated a new collective bargaining agreement on behalf of the deputies and dispatchers. At the time of the dispute in this case, POAM and the MCPDSA were operating under their respective 2005-2007 collective bargaining agreements.

On May 11, 1999, while the deputies, dispatchers, and corrections officers were all represented by the MCPDSA, the Macomb County Sheriff issued memo #99-21, which addressed general overtime procedures and, among other things, implemented a call-in procedure for correctional officers and deputies when overtime was required at the county jail. The procedure was to be used for correctional officer vacancies only, and provided the following order of priority:

> A. Call the Correctional Officers on your shift who are scheduled off and have requested overtime.
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> B. Call the Correctional Officers who are scheduled off on the following two (2) shifts who have requested overtime.
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> C. Fill the vacancy with off-duty Deputies following the Deputy call-in procedure for those who have requested overtime.
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> D. Attempt to have Correctional Officers work a double shift or attempt to have Correctional Officers work four (4) hours over, or come in four (4) hours early.
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> E. Order progressively the officer with the least amount of classification seniority working the shift previous to the shift vacancy, to work eight (8) hours of overtime. . . .

Also addressed in the memo was the call-procedure to be used when overtime was required for dispatch. The call-in procedure for dispatchers was similar to that of corrections officers and provided as follows:

> A. Call Dispatchers on your shift who are scheduled off and have requested overtime.
>
> B. Call Dispatchers who are scheduled off on the following two (2) shifts who have requested overtime.
>
> C. Fill the vacancy with off-duty Deputies, qualified to work dispatch, following the Deputy call-in procedure for those who have requested overtime.
>
> D. Attempt to a Dispatcher work a double shift, work four (4) hours over, or come in four (4) hours early.
>
> E. Attempt to have a dispatch qualified deputy work a double.

F. Reassign a qualified Deputy who is scheduled to work that date to fill the vacancy, and fill the new vacancy created according to normal call-in procedures.

G. Order progressively the Dispatcher with the least amount of classification seniority working the shift previous to the shift vacancy, to work eight (8) hours of overtime. . . .

The call-in procedure for jail and dispatch overtime remained unchanged until March 17, 2008, when the sheriff issued Special Order 08-06, superseding memo #99-21. Special Order 08-06 reversed steps C and D for jail and dispatch overtime. As a result, the corrections officers received greater priority for jail overtime than deputies. Dispatchers likewise received greater priority for dispatch overtime. The change in the call-in procedures resulted in financial savings for the County.

After the County issued Special Order 08-06, the deputies filed a grievance against the County through POAM. The grievance alleged that Special Order 08-06 was in direct violation of article 17, § (C)(5), (7) of the deputies' collective bargaining agreement, which addressed overtime call-in procedure.[1] Further, the grievance stated that the call-in procedure was "an economic issue and therefore a mandatory subject of bargaining and violated past-practices regarding the overtime call-in procedures for the same."

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[1] Article 17, § (C) of POAM's collective bargaining agreement provides in relevant part as follows:

3. Employees in the required classification(s) will first be called from the shift for which the overtime is required to be worked. In the event that there are no employees that desire to work overtime on the shift in which it is required, the employees on the following shifts will be called for available overtime.

* * *

5. The Employer shall make every attempt to equalize overtime by first offering overtime to the employee in the required classification(s) who: (1) has requested overtime; (2) has the least amount of overtime hours worked as recorded in the Overtime Log and (3) has the highest seniority.

* * *

7. If the overtime opportunity cannot be filled as described above, those employees in the required classification who have signed up to work a double shift and employees in other classifications, provided that they are capable of performing the work, may be called for overtime in order of the least amount of overtime worked.

The grievance proceeded through the grievance steps contained in POAM's collective bargaining agreement and eventually wound up in arbitration, where it was submitted on stipulated facts and exhibits. On January 7, 2009, the arbitrator issued an award in favor of POAM. The arbitrator agreed with the County that there had been no violation of any specific provision of POAM's collective bargaining agreement. However, the arbitrator determined that the jail and dispatch overtime call-in procedures were a binding past-practice based on mutual agreement and could not be unilaterally changed. The arbitrator stated that "[w]hen the call-in procedures were developed years ago, they were not mere happenstance without design or deliberation. On the contrary, they were designed with a view toward the future which is evidenced by the fact that they were developed into a written policy." The arbitrator ordered the County to restore the call-in procedure and make the deputies whole for the lost overtime.

After the arbitrator issued the award, the County restored the call-in procedures. Thereafter, corrections officers began filing grievances against the sheriff. The MCPDSA alleged that the sheriff had violated the terms of the corrections officers' collective bargaining agreement[2] by unilaterally changing the call-in procedures following the arbitration award. The MCPDSA alleged that call-in procedures for jail overtime were governed by its collective bargaining agreement, and that the sheriff could not change them without negotiating with the MCPDSA.

On March 20, 2009, the County filed a complaint against POAM seeking to have the arbitrator's award vacated. The County argued that the arbitrator exceeded his jurisdiction because the call-in procedures were an issue of managerial discretion left to the County under the

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[2] Article 16, § (C) of MCPDSA officer's collective bargaining agreement provides in relevant part as follows:

> 5. Corrections Officers will first be called from the shift for which the overtime is required to be worked. In the event that there are no Corrections Officers that desire to work overtime on the shift in which it is required, the employees on the following shifts will be called for the available overtime.
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> 6. If the overtime opportunity cannot be filled as described above, those employees in the Corrections Officer classification who have signed up to work a double shift and employees in other classifications, provided that they are trained and qualified to perform the work, may be called for overtime in order of the least amount of overtime worked. In the event employees have an equal amount of overtime hours worked, the overtime shall be worked by the employee with the most departmental seniority.
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> 7. If the overtime opportunity cannot be filled as described above, the Employer shall order progressively, the employee(s) with the least amount of classification seniority working the shift previous to the shift with the vacancy to work the required overtime.

terms of the collective bargaining agreement. The County argued that it was not required to negotiate with POAM before implementing changes in policy. Rather, the County asserted, all that was required under the collective bargaining agreement was that the County communicate with POAM prior to implementing anticipated changes in policy. In the event that the circuit court found in favor of POAM, the County also named the MCPDSA as a defendant and requested an injunction against the MCPDSA.

POAM responded and filed a counter-complaint against the County, because its members had not been made whole as the arbitrator ordered in his award. POAM argued the award was not in conflict with the collective bargaining agreement and that the arbitrator clearly acted within the scope of his jurisdiction.

After an evidentiary hearing, the County and the MCPDSA each filed motions to vacate the arbitration award. The MCPDSA argued that the arbitrator exceeded his jurisdiction because the decision had the affect of altering the terms of the MCPDSA's collective bargaining agreement without the MCPDSA being added as a party to the arbitration proceedings. POAM opposed the motions and filed a motion for summary disposition requesting that the arbitrator's award be affirmed. Subsequently, the circuit court affirmed the arbitrator's award and granted summary disposition in favor of POAM. The County and the MCPDSA now appeal.

The circuit court's decision to enforce, vacate, or modify an arbitration award is reviewed by this Court de novo. *City of Ann Arbor v AFSCME Local 369*, 284 Mich App 126, 144; 771 NW2d 843 (2009). "However, when considering the enforcement of an arbitration award, [this Court's] review is narrowly circumscribed." *Lenawee Co Sheriff v Police Officers Labor Council*, 239 Mich App 111, 117; 607 NW2d 742 (1999). "The arbitrator derives his power from the agreement between the parties, and the agreement is the law of the case." *Chippewa Valley Sch v Hill*, 62 Mich App 116, 119; 233 NW2d 208 (1975). Accordingly, "[t]he necessary inquiry . . . is whether the award was beyond the contractual authority of the arbitrator." *Lenawee Co Sheriff*, 239 Mich App at 118. "'[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority,'" a court may not overturn the decision even if the court is convinced that the arbitrator committed a serious error. *Michigan Ass'n of Police v City of Pontiac*, 177 Mich App 752, 760; 442 NW2d 773 (1989), quoting *United Paperworkers Int'l Union, AFL-CIO v Misco, Inc*, 484 US 29, 38; 108 S Ct 364; 98 L Ed 2d 286 (1987).

On appeal, the County and the MCPDSA argued that the circuit court erred in affirming the arbitrator's award. The County argues that the arbitrator's decision was in clear excess of authority. Specifically, the County relies on two provisions of its collective bargaining agreement with POAM: article 28 and article 5, § (H)(5)(c). Article 28 provides in relevant part as follows:

> The Employer retains and shall have the sole and exclusive right to manage and operate the County in all of its operations and activities through its duly elected or appointed representatives. Among the rights of the Employer, including only by way of illustration and not by way of limitation, is the right to determine all matters pertaining to the services to be furnished and the methods, procedures, means, equipments, and machines required to provide such services; to determine

> the nature and number facilities, departments, and their location; to hire personnel; to establish classifications of work and the number of personnel required; to direct and control its operations; to establish classifications of work and the number of personnel required; to direct and control its operations; to establish, adopt, and modify the budget; and in all respects to carry out the ordinary and customary functions of the Employer, provided that these rights shall not be exercised in violation of any specific provisions of this Agreement. The Union hereby agrees that the Employer retains the sole and exclusive right to establish and administer without limitation, implied or otherwise, all matters not specifically and expressly limited by this Agreement.

Article 5 addresses the grievance process and provides in relevant part as follows:

> c. Any arbitrator selected shall have only the functions set forth herein. The scope and extent of the jurisdiction of the Arbitrator shall only extend and be limited to those grievances arising out of and pertaining to the respective rights of the parties within the four (4) corners of this Agreement, and pertaining to the interpretation thereof. The Arbitrator shall be without power or authority to make any decision contrary to, or inconsistent with, or modifying or varying in any way, the terms of this Agreement or applicable law or rules or regulations having the force and effect of law.

Based on these provisions, the County argues that the arbitrator was without jurisdiction or authority to make any decision regarding jail and dispatch overtime because those issues were not specifically referenced in POAM's collective bargaining agreement. Further, the County argues that article 28 would preclude the establishment of a past practice because it reserves to the County's discretion all matters not specifically and expressly limited by the collective bargaining agreement.

We need not address whether the call-in procedures for jail and dispatch overtime were arbitrable because we conclude that the MCPDSA was a necessary party to this litigation. The MCPDSA's collective bargaining agreement specifically addressed call-in procedures when the sheriff determined that overtime was necessary at the jail. The arbitrator may have had jurisdiction to settle that dispute as it relates to POAM, but the arbitrator's jurisdiction could not extend to decide or alter the terms of the MCPDSA's collective bargaining agreement without the MCPDSA being added as a party to the arbitration proceedings. To properly interpret POAM's collective bargaining agreement, it was necessary for the arbitrator to consider any other related collective bargaining agreements. Therefore, the MCPDSA should have been added as a party to the arbitration process.

In reaching this conclusion, we are guided by the general principles behind MCL 423.231 *et seq.*, (Act 312) which provides for the compulsory arbitration of labor disputes in police and fire departments. MCL 423.231 provides in part, "It is the public policy of this state that in public police and fire departments . . . it is requisite to the high morale of such employees and the efficient operation of such departments to afford an alternate, *expeditious, effective* and binding procedure for the resolution of disputes[.]" (Emphasis added.) Thus, there is an interest in structuring arbitration in an efficient and expeditious manner. Requiring joinder of all parties

that have an interest in the outcome of an arbitration dispute serves to further this goal by reducing the need for further arbitration. The United States Supreme Court applied similar logic in *Transportation-Communication Employees Union v Union Pacific R Co*, 385 US 157; 87 S Ct 369; 17 L Ed 2d 264 (1966).

In *Union Pacific R Co*, a dispute arose over the operation of IBM machines that had been installed by the railroad company. *Id.* at 157-159. The railroad company assigned operation of the machines to member of the brotherhood of Railway Clerks (clerk's union). *Id.* at 158. The Transportation-Communication Employees Union (telegrapher's union), however, claimed that the operation of the IBM machines was for its members under their collective bargaining agreement. *Id.* The complaint was referred to the Railroad Adjustment Board and notice was given to the clerk's union. However, the clerk's union "declined to participate . . . on the ground that it had no interest in the matter but stated its readiness to file a like proceeding before the Board to protect its members should any of their jobs be threatened." *Id.* at 158-159. The Railroad Adjustment Board heard the complaint and "concluded that the telegraphers were entitled to the jobs under their contract." *Id.* at 159. The telegrapher's union then brought an action in the United States District Court to enforce the award. *Id.* The district court, however, dismissed the case on the ground that the clerks' union was an indispensable party. *Id.* Dismissal was affirmed on appeal to the federal circuit court. *Id.* at 160.

The Unites States Supreme Court granted certiorari to determine whether "the Adjustment Board must exercise its exclusive jurisdiction to settle disputes like this in a single proceeding with all disputant unions present." *Id.* In answering in the affirmative, the Supreme Court explained as follows:

> A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts. ". . . It is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant." In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements. This is particularly true when the agreement is resorted to for the purpose of settling a jurisdictional dispute over work assignments.
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> * * *
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> By first ordering the railroad to pay one union and then later, in a separate proceeding, ordering it to pay the other union, without ever determining which union has the right to perform the job and thus without ever prejudicing the rights of the other union, the Board abdicates its duty to settle the entire dispute. Yet this is precisely the kind of merry-go-round situation which the petitioner claims is envisaged by the Act, a procedure which certainly does not "provide for the *prompt* and *orderly* settlement of *all* disputes . . . ," the purpose for which the

> Adjustment Board was established. § 2 (5). (Emphasis supplied.) [*Id.* at 160-162 (citations omitted).]

We find the reasoning employed in *Union Pacific R Co* persuasive. Both POAM and the MCPDSA claim that their respective collective bargaining agreements give their members the right to priority for jail overtime. POAM filed the initial grievance that began this litigation, and asserted that the County's unilateral alteration of the call-in priority violated POAM's collective bargaining agreement and established past practices. To properly interpret POAM's collective bargaining agreement, "it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Id.* at 161. Therefore, the MCPDSA should have been added as a party to action.

POAM argues that to the extent the MCPDSA had an interest in the arbitration, that interest was adequately represented by County. POAM seemingly relies on the language of MCR 2.209(A)(3), which provides for intervention as of right "unless the applicant's interest is adequately represented by existing parties." However, although the MCPDSA and the County have similar interests, those interests are not completely aligned. The County is arguing that the call-in procedures for jail overtime remained a matter of managerial discretion for the County to change without approval of the unions. The MCPDSA favors the County's change in policy, but also argues that the call-in procedures are governed by the terms of its collective bargaining agreement and cannot be unilaterally changed. Therefore, it cannot be said that the County was adequately representing the MCPDSA's interest in the litigation.

Further, to the extent MCR 2.209(A) is helpful in resolving this issue, this Court has stated that "'[t]he rule for intervention should be liberally construed to allow intervention where the applicant's interests may be inadequately represented.'" *Hill v L F Transp, Inc*, 277 Mich App 500, 508; 746 NW2d 118 (2008), quoting *Neal v Neal*, 219 Mich App 490, 492; 557 NW2d 133 (1996). As applied here, the MCPDSA's interest may not have been adequately represented by the County.

Because we find that the MCPDSA was a necessary party to the arbitration proceedings, we vacate the order of the circuit court and remand to the arbitrator for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder